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Supreme Court of the United States

OCTOBER TERM, 1928.

No.

MARYLAND CASUALTY COMPANY,

(A CORPORATION),

Petitioner,

vs.

MILLIE R. JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

May it please the Court:

The petition of Maryland Casualty Company respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

That this action was commenced by the filing of a complaint in the Superior Court of the State of California in and for the City and County of San Francisco, by Millie R. Jones, the respondent herein, as plaintiff, against the Maryland Casualty Company, the petitioner herein, and one Elizabeth A. Rodgers, as defendants (R. p. 2). It was removed to the District Court of the United States for the Northern District of California, Southern Division, on the ground of diversity of citizenship (R. p. 30).

The action was brought upon a certain bond made by one Akers, as principal, with your petitioner as surety, in the sum of $25,000; the bond is set forth in full in the answer of your petitioner to the respondent's complaint (R. p. 39-42). The bond is also set forth in your petitioner's bill of exceptions taken in the case (R. pp. 125-128). Your petitioner in its said answer denied that it was indebted to the respondent in any amount. The entire fundamental dispute in the case is concerned with the meaning and interpretation of said bond and the evidence given concerning the same.

The case was tried by the Court without a jury, pursuant to written stipulation of the parties filed in the case (R. p. 48).

Evidence was duly taken before the District Court upon the issues raised by the pleadings, and upon the conclusion of the whole evidence taken in the case before the Court, the defendant moved the Court to grant a nonsuit against the plaintiff (R. pp. 239-242).

The motion was made upon specific grounds stating wherein the evidence failed to support a judgment in favor of the plaintiff and the Court denied the motion and allowed an exception to the ruling thereon. All of these proceedings are contained in the bill of exceptions settled and allowed by the District Court (R. p. 242).

The same day (May 10, 1927) the Court ordered that judgment be entered in favor of the plaintiff and that the case be referred to a referee to take and state an account and report the same to the Court in accordance with an interlocutory decree entered on the same day (R. pp. 50-54 and p. 242).

On June 16, 1927, the Referee presented his report to the Court, showing a liability upon the part both of Akers and of your petitioner to the respondent in the sum of $25,000, with interest (R. pp. 319-322).

An exception to the report was duly taken by your petitioner at the time of its presentation to the Court, and this exception is shown in the bill of exceptions (R. pp. 323-324). The Court, however, overruled said exceptions.

The defendant had theretofore requested that special findings be filed (R. p. 49) and on August 15, 1927, the Court filed its "Findings of Fact and Conclusions of Law" (R. pp. 54-72). On the same day and in the same paper judgment was ordered entered in favor of the respondent against your petitioner for $29,880.57 and costs (R. pp. 72, 73). Exceptions to said decision and judgment of the Court were taken by your petitioner (R. pp. 324-327).

A writ of error was sued out to the Circuit Court of Appeals for the Ninth Circuit. That Court refused to consider the case upon its merits, and affirmed the judgment of the District Court. 27 Fed. (2d) 521 (R. pp. 354-357).

The Court, speaking through Judge Rudkin, said in part:

> "All the assignments of error are based upon the insufficiency of the testimony to support the special findings; but the special findings, as made, were not excepted to, and there was no request for other or different findings.
>
> "Section 700 of the Revised Statutes (28 U. S. C. A., Sec. 875) provides that when an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or appeal; and when the finding is special the review may extend to a determination of the sufficiency of the facts found to support the judgment.
>
> "On such a record it is too well settled to admit of further controversy that this court cannot consider the sufficiency of the testimony to support the special findings, but only the sufficiency of the special findings to support the judgment. Lewellyn vs. Electric Reduction Co., 275 U. S. 243, 48 S. Ct. 63, 72 L. Ed ... The plaintiff in error does not contend that the special findings are insufficient for that purpose, and the contrary is apparent from an inspection of the record. Having

reached this conclusion, no useful purpose would be served by setting forth the voluminous findings, either in detail or in substance."

27 Fed. (2d) 521, 522. (R. pp. 354-355.)

A petition for rehearing of the case was denied by said Circuit Court of Appeals on October 1, 1928 (R. p. 357).

Your petitioner respectfully submits, however, that all the assignments of error were not *based upon the insufficiency of the testimony to support the special findings*, but that certain of the assignments of error were *based upon rulings of the Court in the progress of the trial of the cause, excepted to at the time, and duly presented by a bill of exceptions*, to wit:

Assignment No. 1 (R. pp. 330-332): Based upon the refusal of the Court to grant a nonsuit on defendant's motion, for the specific grounds stated therein (R. pp. 239-242).

Assignments Nos. 11, 12 and 14 (R. pp. 334-335): Based upon the action of the Court in disallowing defendant's exceptions to the report of the Referee.

Assignments Nos. 17, 18, 19 and 20 (R. pp. 335-339): Based upon rulings of the Court on certain evidence offered during the course of the trial.

Assignment No. 16 (R. p. 335): Based upon the action of the Court in including interest in the judgment.

Assignment No. 21 (R. pp. 339-340): Based on the action of the Court in referring the cause to a Master and Referee for the purpose of taking further testimony.

It is, of course, admitted by your petitioner that there was no request for different findings.

Your petitioner, however, respectfully shows to the Court that every proper exception required by statute or by the rulings of this Court was taken, to the end that the Circuit Court of Appeals could and would review the findings of the District Court and render its judgment upon the merits of the case, as shown by the evidence taken and heard by the District Court.

B.

Reasons Relied on for the Allowance of the Writ.

1. Because the Circuit Court of Appeals refused to consider the case upon the merits thereof, and failed to review the rulings of the District Court in the progress of the trial, excepted to at the time and duly presented by a bill of exceptions.

2. Because said decision of the Circuit Court of Appeals (27 Fed. [2d] 521—R. pp. 354-355) is in conflict with the following applicable decisions of this Court on an important question of federal practice and procedure.

Fleischmann Co. vs. United States, 270 U. S. 349;
St. Louis vs. W. U. Tel. Co., 148 U. S. 92;
Martinton vs. Fairbanks, 112 U. S. 673;
Norris vs. Jackson, 9 Wall. 125.

3. Because said decision of the Circuit Court of Appeals is in conflict with the following decisions of another Circuit Court of Appeals on the same matter.

Bank of Waterproof vs. Fidelity & Deposit Co. (C. C. A. 5th), 299 Fed. 478;
Griffith vs. Thompson (C. C. A. 5th), 10 Fed. (2d) 127.

4. Because the District Court erred in certain rulings specifically set out in the assignment of errors (R. pp. 330-340).

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 5366,

Maryland Casualty Company, a corporation, Plaintiff in Error, vs. Millie R. Jones, Defendant in Error, and that the said judgment of the United States Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

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Supreme Court of the United States

OCTOBER TERM, 1928.

No.

MARYLAND CASUALTY COMPANY,

(A Corporation),

Petitioner,

vs.

MILLIE R. JONES,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The District Court filed no opinion in the case. The opinion in the United States Circuit Court of Appeals for the Ninth Circuit is reported in 27 Federal Reporter, 2d Series, p. 521 (R. pp. 354-355).

II.

Jurisdiction.

1. The date of the judgment to be reviewed is July 2, 1928 (R. pp. 356-357). A petition for rehearing was denied on October 1, 1928 (R. p. 357).

2. Your petitioner submits that this Honorable Court should review the decision of the Circuit Court of Appeals in this case for the reasons set out under heading B in the foregoing petition (page 5 hereof), which, in the interest of brevity, are repeated at this point.

3. The jurisdiction of this Honorable Court in invoked under the provisions of the Judicial Code, Section 240, as amended by the Act of February 13, 1925, 43 Stat. 938.

4. The following cases are believed to sustain the jurisdiction of the Supreme Court:

(a) Review of Error of C. C. A. in refusing to consider case on merits.

Kraus Bros. Lumber Co. vs. Mellon, 276 U. S. 386;

Lutcher & Moore Lumber Co. vs. Knight, 217 U. S. 259;

Liberty Oil Co. vs. Condon Nat. Bank, 260 U. S. 235.

(b) Certiorari to secure uniformity of decision.

Magnum Import Co. vs. Coty, 262 U. S. 159.

(c) Cases in this Court in conflict with decision of C. C. A. herein:

Fleischmann C. Co. vs. United States, 270 U. S. 349;

St. Louis vs. W. U. Tel. Co., 148 U. S. 92;

Martinton vs. Fairbanks, 112 U. S. 673;

Norris vs. Jackson, 9 Wall. 125.

(d) Cases in C. C. A. 5th in conflict with decision of C. C. A. herein:

Bank of Waterproof vs. Fidelity & Deposit, 299 Fed. 478;

Griffin vs. Thompson, 10 Fed. (2d) 127.

III.

Statement of the Case.

A full statement of the case has been given under heading "A" in the petition, and, in the interest of brevity, is not repeated at this point.

IV.

Specifications of Errors.

1. The Circuit Court of Appeals erred in refusing to consider the case upon the merits thereof, and in failing to review the rulings of the District Court in the progress of the trial, excepted to at the time, and duly presented by a bill of exceptions.

2. The Circuit Court of Appeals erred in finding and holding that all the assignments of error (R. pp. 330-340) were based upon the insufficiency of the testimony to support the special findings (R. p. 354).

3. The Circuit Court of Appeals erred in failing to reverse the judgment of the District Court because of errors in the rulings of the District Court embodied in the assignment of errors.

V.

ARGUMENT.

The Circuit Court of Appeals Erred in Refusing to Consider the Case Upon Its Merits.

A.

The Controlling Statute and Cases in This Court.

Section 700 of the Revised Statutes (Feb. 13, 1925, C. 229, Sec. 1, 43 Stat. 936, 28 U. S. C. A. 875) provides:

> "When an issue of fact in any civil cause in a district court is tried and determined by the court with-

> out the intervention of a jury, according to Section 773 of this title, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

The Circuit Court of Appeals refused to consider the case upon its merits, saying:

> "All the assignments of error are based upon the insufficiency of the testimony to support the special findings; but the special findings, as made, were not excepted to and there was no request for other or different findings."
>
> 27 Fed. (2d) 521. (R. p. 354.)

We have shown that all the assignments of error were not "based upon the insufficiency of the testimony to support the special findings," but that some of them were based upon "rulings of the Court in the progress of the trial of the case, excepted to at the time and duly presented by a bill of exceptions," as required by the above statute. These rulings should have been reviewed by the Circuit Court of Appeals.

In the case of *Fleishmann Construction Co. vs. United States*, 270 U. S. 349, this Court said at page 356, that in order to obtain a review by an Appellate Court of conclusions of law a party must do one of two things:

> He "must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the Court and obtain a ruling on them."

In the case of *Lewellyn vs. Electric Reduction Co.*, 275 U. S. 243, cited by the Circuit Court of Appeals in its opinion, this Court, speaking through Mr. Justice Stone, said:

> "A trial by jury having been waived in writing, our review in this case is limited to the sufficiency of

the facts specially found to support the judgment, *and to the rulings excepted to and presented by the bill of exceptions.* (Rev. Stat., Sec. 649, 700, U. S. C. title 28, Sec. 773, 875, Fleischman Constr. Co. vs. United States, 270 U. S. 349, 70 L. ed. 624, 46 Sup. Ct. Rep. 284.)" (Italics ours.)

B.

The Motion for Nonsuit.

The petitioner in this case did, as above shown, present the propositions of law to the Court by its motion for nonsuit and it obtained a ruling upon those propositions and an exception to that ruling.

It has always been the rule of this Court that when at the close of the evidence a motion for judgment is made by a defendant upon the ground that the evidence is not sufficient to support a judgment in favor of the plaintiff, then the question whether or not the evidence is sufficient to support such a judgment becomes a question of law and must be determined by the Court on appeal.

St. Louis vs. Western Union Tel. Co., 148 U. S. 92;
Martinton vs. Fairbanks, 112 U. S. 673;
Norris vs. Jackson, 9 Wall. 125.

See also—

Bank of Waterproof vs. F. & D. Co., 299 Fed. 478;
Griffin vs. Thomson, 10 Fed. (2d), 127.

In the *Griffin vs. Thompson* case the Circuit Court of Appeals for the Fifth Circuit said:

"Error is also assigned to the refusal of the court to make special findings of fact and of law. This was within the discretion of the court and not error, but, as a motion for judgment was made by the defendant,

the whole case is properly before us on the facts and the law."

Griffin vs. Thompson, 10 Fed. (2d), 127, 128.

Indeed the Circuit Court of Appeals for the Ninth Circuit itself has held exactly the same thing and cited the case last above quoted to the same effect.

Sartoris vs. Utah Const. Co., 21 Fed. (2d), 1.

Everything done by or before the trial court is in the record. At the very beginning of the bill of exceptions, it is stated that,

> "Thereupon the following proceedings, and no other material to the issues, were had" (R. p. 83).

If it be suggested to the Court that no proper motion for judgment was made by the petitioner in the Court below, the answer is that the motion for a nonsuit was in all essentials a motion for judgment in behalf of the defendant.

By Section 581 of the Code of Civil Procedure of the State of California, it is provided in Sub-division 5, that an action may be dismissed or a judgment of nonsuit entered

> "by the Court, upon the motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury."

In the case at bar a trial by jury had been waived by written stipulation, but, without regard to that, it has been squarely held by this Court that where the statute of a state permits a peremptory nonsuit, a Federal Court in the State will follow such statute when the occasion for a motion for such nonsuit arises.

Coughran vs. Bigelow, 164 U. S. 301, 308.

And this case has very lately been cited by the Circuit Court of Appeals for the Third Circuit as the law concern-

ing non-suit in the Federal Courts, in the case of *Stapleton vs. Reading Company*, 26 Fed. (2d) 242, 243.

We, therefore, respectfully submit that the bill of exceptions shown in the record contains every proper exception necessary to enable a Court upon appeal to determine from the evidence whether or not there is any evidence to support the judgment and that this Court certainly should so hold in view of its own language used in the case of *Liberty Oil Co. vs. Condon Natl. Bank*, 260 U. S. 235, at page 245, as follows:

> "Under Sec. 269 of the Judicial Code, as amended by the Act of February 26, 1919, c. 48, 40 Stat. 1181, appellate courts are enjoined to give judgment after an examination of the record without regard to technical errors, defects or exceptions, which do not affect the substantial rights of the parties."

C.

Other Rulings.

Other rulings of the Court in the progress of the trial, excepted to at the time and duly presented by the bill of exceptions, include

(a) Rulings on defendant's exceptions to the Referee's report (Assignments of Error Nos. 11, 12, and 14, R. pp. 334-335).

(b) Rulings on the evidence (Assignments Nos. 17, 18, 19 and 20, R. pp. 335-339).

(c) The ruling of the Court including interest in the judgment (Assignment No. 16, R. p. 335).

(d) The ruling of the Court in referring the case to the Referee (Assignment No. 21, R. pp. 339-340).

Under the statute and cases above cited, we respectfully submit that the Circuit Court of Appeals should have reviewed these rulings.

CONCLUSION.

We respectfully submit that the petition should be granted and the case remanded to the Circuit Court of Appeals for further consideration and determination upon the merits as shown by the evidence.

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